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No. 05-1304

In the Supreme Court of the United States

DOUGLAS JONES, PETITIONER

v.

DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Section 211(b)(3)(C) of the Energy Reorganization Act of 1974, the Department of Labor may find discrimination only if the complainant has demonstrated that protected activity "was a contributing factor" in a challenged personnel action. 42 U.S.C. 5851(b)(3)(C). The question presented is whether the Department, in determining whether a complainant has met that burden, may apply the burden-shifting framework established under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, under which the complainant must show that it is more likely than not that the employer's articulated, legitimate reasons for the unfavorable employment action were a pretext for discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-17a) is not published in the *Federal Reporter*, but is *reprinted in* 148 Fed. Appx. 490. The decision of the Department of Labor's Administrative Review Board (Pet. App. 18a-47a) is unreported. The recommended decision of the administrative law judge (Pet. App. 61a-150a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. A petition for rehearing was denied on January 10, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on April 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 211(a) of the Energy Reorganization Act of 1974 (ERA) (as amended) prohibits discrimination against employees in the nuclear energy industry who engage in certain protected activities. 42 U.S.C. 5851(a). The Secretary of Labor is responsible for investigating complaints of discrimination. After completion of an investigation, the Secretary either issues an order denying the complaint or finds discrimination and provides relief. 42 U.S.C. 5851(b)(2).

The Secretary may find discrimination "only if the complainant has demonstrated that [protected activity] * * * was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(C). Even if the complainant makes that required showing, the Secretary may not order relief "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]." 42 U.S.C. 5851(b)(3)(D).

Under the Secretary's regulations, either the complainant or the respondent may request a hearing before an Administrative Law Judge (ALJ), who issues a recommended decision. The ALJ's recommended decision is reviewable by the Department of Labor's Administrative Review Board (Board). 29 C.F.R. 24.4(d), 24.6, 24.7, 24.8(a). The Board's final decision is reviewable in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1); 29 C.F.R. 24.8. In reaching its decision, the Board is authorized to review the entire record and to make its own findings of fact. See 5 U.S.C. 557(b); *Trimmer* v. *United States Dep't of Labor*, 174 F.3d 1098, 1102 n.6 (10th Cir. 1999).

The court of appeals reviews the Board's findings under the substantial evidence standard. See *Stone & Webster Eng'g Corp.* v. *Herman*, 115 F.3d 1568, 1571 (11th Cir. 1997).

2. Petitioner is a former employee of the United States Enrichment Corporation (USEC). Pet. App. 4a. Petitioner worked at USEC's gaseous diffusion plant in Paducah, Kentucky. *Ibid.* In April 1999, petitioner transferred to a department responsible for developing training materials for mobile industrial equipment. *Id.* at 20a-21a. Petitioner's duties included developing training materials for powered industrial trucks. *Id.* at 5a-21a.

One of petitioner's projects related to a regulation issued by the Occupational Safety and Health Administration (OSHA) that was to become effective in December 1999. Pet. App. 5a. That regulation threatened to make USEC's training program for trucks non-compliant. *Ibid.* Petitioner filed a problem report in May 1998 to ensure that a tracking mechanism existed that would resolve deficiencies before the compliance date. *Ibid.* Thereafter, petitioner filed 13 problem reports relating to various deficiencies. *Ibid.*

Petitioner did not develop the training module in time to meet the December 1999 compliance date. Pet. App. 5a. In January 2000, petitioner requested an assignment to a different job. *Ibid.* In support of the request, petitioner stated that his lack of experience made the training department appear weak and led to difficulty communicating problems he perceived. *Ibid.* Petitioner also stated that there were "probably other personnel who would do a much better job." *Ibid.* The manager of the training department denied petitioner's request for a reassignment and instead assigned a more

experienced employee, Ed Craven, to work with petitioner. *Id.* at 5a-6a. When petitioner's performance was next evaluated, he received a "meets expectation" rating on four performance factors, but a "below goals/expectations" rating on the factor relating to job knowledge, initiative, and interpersonal skills. *Id.* at 6a. Petitioner challenged his assessment, but USEC's human resources department concluded that the assessment was justified. *Ibid.*

In February 2000, USEC announced a reduction in force. Pet. App. 6a. Management determined that one of the reductions would have to come from petitioner's division. *Ibid.* Petitioner and Craven were the only two employees in that division. *Ibid.* The managers unanimously rated petitioner considerably lower than Craven on a list of job ratings. *Ibid.* Accordingly, on July 5, 2000, USEC discharged petitioner. *Ibid.*

On December 21, 2000, petitioner filed a complaint with the Department of Labor, alleging that the discharge violated Section 211 of the ERA, 42 U.S.C. 5851. Pet. App. 6a. After an investigation, the Department of Labor found no discrimination. *Id.* at 6a-7a.

3. Petitioner then requested a hearing before an ALJ, who found that petitioner had been subjected to discrimination based on protected activity under Section 211 of the ERA and recommended a finding of discrimination. Pet. App. 61a-150a. The ALJ concluded that petitioner had established a prima facie case of discrimination, *id.* at 116a-121a, that the employer had failed to show by clear and convincing evidence that the alleged disparate treatment was motivated by a legitimate nondiscriminatory reason, *id.* at 121a-124a, and that petitioner had established that the company's asserted reasons for acting were a pretext for discrimination, *id.* at

124a-132a. The ALJ further determined that USEC had failed to establish by clear and convincing evidence that it would have taken the same action in the absence of discrimination. *Id.* at 133a-136a.

4. The Board reversed the ALJ's decision and denied petitioner's complaint. Pet. App. 18a-47a. The Board initially held that the ALJ had erred in requiring USEC to respond to the complainant's prima facie case with clear and convincing evidence that it would have taken the same action for legitimate reasons. *Id.* at 26a. The Board explained that such a burden "arises only if [petitioner] has proven by a preponderance of the evidence that [the employer] terminated his employment in part because of his protected activity." *Ibid.* In responding to petitioner's prima facie case, the Board stated, USEC's sole burden was to articulate a legitimate reason for terminating petitioner. *Id.* at 27a.

The Board assumed, without finding, that petitioner had engaged in protected activity. Pet. App. 28a. The Board concluded, however, that petitioner failed to establish that his protected activity was a contributing factor in USEC's decision to terminate his employment. *Id.* at 29a-30a.

In reaching that conclusion, the Board applied the methodology developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Under that methodology, once a complainant establishes a prima facie case, and the employer rebuts it, the complainant must prove that the employer's reason is a pretext and that the employer's decision was made at least in part because of the employee's protected activity. Pet. App. 29a-30a. In this case, the Board found that the employer had produced a legitimate reason for terminating petitioner: the other employee in petitioner's training divi-

sion (Craven) had "objectively better qualifications, training, and performance." *Id.* at 30a. The Board rejected as unpersuasive petitioner's attempts to show that the employer's explanation was a pretext for discrimination. *Id.* at 30a-46a. In particular, it found that USEC did not prevent petitioner from using available resources to complete his assignments, *id.* at 31a-33a, that USEC's assignment of Craven to assist petitioner was a legitimate business decision, *id.* at 33a-35a, that petitioner's mid-year evaluation fairly reflected his performance, *id.* at 35a-37a, that petitioner had failed to show that the officials who rated him below Craven had a negative attitude toward him because of his protected activities, *id.* at 37a-39a, and that petitioner failed to show he was rated below Craven because of protected activities, *id.* at 40a-45a.

5. The court of appeals upheld the Board's decision. Pet. App. 3a-17a. The court rejected petitioner's argument that the Board had erred by applying the Title VII burden-shifting framework. *Id.* at 9a-10a. The court reasoned that, although Section 211 of the ERA had its own burden-shifting standards, petitioner had not shown how the Board's use of Title VII "pretext analysis" adversely affected his case or was incompatible with Section 211. *Id.* at 10a. The court concluded that because substantial evidence supports the Board's determination that petitioner failed to establish by a preponderance of the evidence that retaliation for protected activity contributed to his termination, the asserted error was "at most a harmless one." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other

court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 16-19) that the Board contravened congressional intent by using a Title VII "pretext" analysis and that the Board's use of that analysis was not harmless error. Neither of those contentions is correct.

a. Under the Title VII framework, a plaintiff seeking to prove discrimination through circumstantial evidence must first establish a prima facie case, which creates a presumption of discrimination. See, *e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506 (1993). The employer then has the burden of producing a legitimate, nondiscriminatory explanation for its actions. *Id.* at 507. If the employer does so, the presumption disappears, and the plaintiff must establish discrimination by a preponderance of the evidence. *Id.* at 507-508, 520. A prima facie case, together with proof that the employer's explanation is a pretext, does not require a trier of fact to find discrimination, *id.* at 517-519, but permits it to do so. *Id.* at 511; *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-148 (2000). "It is not enough * * * to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Ctr.*, 509 U.S. at 519.

Petitioner contends (Pet. 12) that the Board could not use a Title VII analysis because Congress required a distinct standard that would make it easier for whistleblowers to prevail when it amended the ERA in 1992. See Energy Policy Act of 1992 (1992 Act), Pub. L. No. 102-486, § 2902, 106 Stat. 3123. Petitioner's argument overstates the effect of the 1992 amendment. While the amendment was intended to make it easier for an employee to prevail, it does not foreclose the use of pretext

analysis as an aid in determining whether there has been a violation of Section 211.

Before 1992, the ERA's employee protection provision had no burden of proof rules. See 42 U.S.C. 5851 (1988). The Department of Labor relied on Title VII burden-shifting principles together with mixed motive analysis to determine whether there was a violation of Section 5851. See, *e.g.*, *Dartey*, No. 82-ERA-2, 1983 WL 189787, at *3-*4 (Dep't of Labor Apr. 25, 1983). Under those principles, if the employee established a prima facie case, and the employer satisfied its burden of production, the Secretary would then examine evidence that the employer's stated reason was a pretext. Based on that analysis, the Secretary could conclude that the employer's reason was a pretext for discrimination and rule for the employee, or conclude that the employer was not motivated in whole or in part by protected activity and rule for the employer, or conclude that an employer acted out of mixed motives. *Id.* at *4. If the Secretary concluded that the employee had proven by a preponderance of the evidence that protected activity was a "motivating factor," the Department allowed the employer to escape liability by proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct. *Ibid.*

The 1992 amendments added 42 U.S.C. 5851(b)(3)(C) and (D) to the ERA. 1992 Act, § 2902, 106 Stat. 3123. Section 5851(b)(3)(C) requires an employee to prove that discrimination was a "contributing factor" to an adverse action, rather than a "motivating" factor. 42 U.S.C. 5851(b)(3)(C). The 1992 amendments do not change the preponderance of the evidence test that applied in deciding whether an employee has met his burden of proof. When the employee's evidence shows that protected

activity is a contributing factor, 42 U.S.C. 5851(b)(3)(D) requires the employer to prove that the same action would have been taken in the absence of discrimination by clear and convincing evidence rather than by a preponderance of the evidence, as was formerly the case. Because the 1992 amendments say nothing about how an employee may prove that protected activity was a contributing factor to an adverse action, the Board reasonably adhered to pre-1992 law on how a plaintiff could prove that protected activity was a motivating factor in such an action. See Pet. App. 27a (citing *Dartey, supra*); *Hasan* v. *United States Dep't of Labor*, 400 F.3d 1001, 1004 (7th Cir.) ("The parties agree that the same standard for establishing a prima facie case of retaliation that is used in employment discrimination statutes such as Title VII is appropriate in retaliation cases brought under the Energy Reorganization Act."), cert. denied, 126 S. Ct. 183 (2005).

Applying that methodology here, the Board determined that petitioner failed to bear his burden of proving that protected activity was a contributing factor to his termination. See Pet. App. 30a-46a. Because petitioner failed to satisfy that burden, there was no reason to address whether the employer could show that it would have taken the same action under the heightened "clear and convincing" evidence standard. And the Board and the court of appeals were right to reject the ALJ's importation of that standard into the Section 5851(b)(3)(C) "contributing factor" analysis for determining discrimination in the first place, where it does not belong.

b. In any event, as the court of appeals explained, even if the Board had erred in applying the Title VII framework, any such error would have been harmless.

However the burden-shifting scheme is formulated, the complainant must prove by a preponderance of the evidence that his protected activity contributed to his termination; otherwise, the burden never shifts to the employer to establish by clear and convincing evidence its same-decision defense. The Board, which is authorized to review the entire record and find its own facts, specifically found in this case that petitioner failed to prove that protected activity was a contributing factor in petitioner's termination. Pet. App. 30a. The court of appeals affirmed that finding as supported by substantial evidence. *Id.* at 10a. There is no reason for this Court to review that fact-bound question. See Sup. Ct. R. 10.

2. Contrary to petitioner's assertion (Pet. 11), the decision below is not a "departure" from decisions of other courts of appeals. It is fully consistent with the Seventh Circuit's decision in *Hasan*, 400 F.3d at 1004, which applied Title VII standards in determining whether an employee establishes a prima facie case of retaliation under the ERA. See *Dysert* v. *United States Sec'y of Labor*, 105 F.3d 607, 609 (11th Cir. 1997) (upholding DOL's interpretation of 42 U.S.C. 5851(b)(3)(C), as requiring an employee to prove by a preponderance of the evidence that protected activity was a contributing factor in an adverse action without discussing how an employee could meet that burden). No other case petitioner cites addressed the issue presented here, much less creates a circuit conflict.

In *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (1997), the Eleventh Circuit held that Section 211 requires an employee to persuade the Secretary that protected activity was a contributing factor in an adverse action and then, if the employee succeeds, allows an employer to prove by clear and convinc-

ing evidence that it would have taken the same action in the absence of protected activity. The court affirmed the Secretary's findings that the employee in that case met his burden of showing he had suffered retaliation for engaging in protected activity while the employer did not meet its burden of showing it would have taken the same action in any event. *Id.* at 1573-1576. *Stone & Webster* did not address the standards to be applied in deciding whether an employee meets his burden of showing that a protected activity was a contributing factor in the employer's adverse action.

Similarly, in *Trimmer* v. *United States Department of Labor*, 174 F.3d 1098 (1999), the Tenth Circuit held that "[o]nly if the complainant meets his burden [of proving by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an unfavorable employment decision] does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Id.* at 1102. Applying that analysis, the court affirmed the Secretary's finding that the complainant failed to prove an adverse employment action. *Id.* at 1103-1104. As in *Stone & Webster*, the court did not address the standards for determining whether a protected activity was a "contributing factor" in an adverse action under Section 211.

Petitioner also cites (Pet. 12) *Williams* v. *Administrative Review Board*, 376 F.3d 471, 476 (5th Cir. 2004). In that case, the court agreed with the parties that hostile work environment claims are cognizable under Section 211, held that Title VII standards applied in determining an employer's liability for supervisory harassment, and affirmed the Board findings of no harassment

or other discrimination. *Id.* at 476-480. The court said nothing about the question presented in this case.

Thus, none of the decisions relied on by petitioner addressed the question of how an employee may satisfy his burden of showing that his protected activity was a contributing factor in an adverse employment action. And, in any event, because the court of appeals in this case determined that any error in the Board's approach to that question would be harmless, this case is not an appropriate one in which to decide that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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